CONTEXT AND HISTORY FOR NEPA 101 AND ENVIRONMENTAL CONFLICT RESOLUTION

The U.S. Institute for Environmental Conflict Resolution (the Institute) was established by Congress as an entity under the auspices of the Morris K. Udall Foundation, an independent agency in the executive branch overseen by a board of trustees appointed by the President and confirmed by the U.S. Senate. The Institute serves as an impartial, non-partisan institution providing professional expertise, services, and resources to all parties in environmental disputes involving federal agencies. The Institute was directed by Congress, in its authorizing legislation, to assist in the implementation of Section 101 of the National Environmental Policy Act[1] (NEPA) through assessment, mediation, consensus building and other collaborative processes. In Section 101 of NEPA, Congress established broad environmental policies for the nation, articulated some specific goals to be achieved in the course of implementing those policies, recognized that each person should enjoy a healthful environment, and stated that each individual "has a responsibility to contribute to the preservation and enhancement of the environment." The reader is encouraged to review the complete text of Section 101 in Appendix A.

The Institute established the National Environmental Conflict Resolution Advisory Committee in 2002 to advise it on carrying out its programmatic responsibilities, including its responsibilities in regards to Section 101 of NEPA. The Committee appointed a NEPA Section 101 Subcommittee to work specifically on: 1) learning more about whether and how federal agencies could better achieve the objectives of Section 101 through collaborative processes and consensus building, 2) how Section 101, as a statement of national environmental policy objectives, might serve as a guide for improvements in environmental conflict resolution use and practice, and 3) how the Institute's work could advance both.

It is helpful to understand this effort in the context of Section 101 of NEPA. When Congress debated NEPA in 1969, a great deal of discussion centered around this unprecedented effort at articulating environmental policy on a national level. Congressional debate about those policies was preceded by a joint House-Senate "Colloquium to Discuss a National Policy for the Environment", held in July, 1968, followed by the publication of a "Congressional White Paper on a National Policy for the Environment". Those efforts focused considerable attention on appropriate policy statements, as well as the mechanisms for carrying out those policies. NEPA was introduced in the Senate on the same day as the White Paper was published in the Congressional Record. Senator Henry Jackson introduced it with the explanation that, "The survival of man, in a world in which decency and dignity are possible, is the basic reason for bringing man's impact on his environment under informed and responsible control."

Importantly, NEPA's implementation to date has been different from what the framers of the legislation anticipated. Judicial reluctance to interpret and enforce in court the policies of Section 101[2] along with considerable judicial scrutiny of federal agencies' compliance with the procedural provisions of

[1] 42 U.S.C. §4321 *et. seq*. Section 101 appears as Appendix A to this text.

[2] "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

NEPA[3] have led many to ignore Section 101 or dismiss it as purely hortatory language. Though not generally enforced in court, it would be inaccurate to say that Section 101 has had no effect whatsoever. It has been used by Presidents of both parties as the basis for executive orders, policy statements and directives to heads of agencies. Environmental analyses for actions that have been determined not to trigger the procedural requirements of the Act (for example, trade agreements) have been undertaken in some measure because the existence of NEPA's policy mandate provides a rationale above and beyond its procedural requirements. Finally, it has been used as a model by other countries for both statutory and constitutional provisions to articulate environmental policy. Nonetheless, of concern to some participants in environmental debates, it is clear that the day-to-day implementation of NEPA tends to focus more on process rather than substantive policy.

The National Environmental Conflict Resolution Advisory Committee believes many of the underlying principles of Section 101 of NEPA are consistent with the central tenets of environmental conflict resolution, and that several expected outcomes of both NEPA and well-managed environmental conflict resolution work are complementary.

As a first step to addressing the Committee's charge, the NEPA Subcommittee identified five basic components to the objectives of NEPA 101, the first three of which were substantive and the last two procedural. The Subcommittee identified a need to explain the relationship between NEPA 101 and environmental conflict resolution, including how the practice of environmental conflict resolution contributes to the achievement of the national environmental policy objectives articulated in Section 101 of NEPA. Thus, it produced two draft papers, "Primary Objectives and Underlying Principles Derived from Section 101 of the National Environmental Policy Act" and "Shared Principles – NEPA Section 101 and Environmental Conflict Resolution." The papers were discussed and approved by the full Advisory Committee at its November, 2003, meeting in Tucson, Arizona. (See attached.)

It also is helpful to understand these components in the context of the evolution of environmental conflict resolution in practice and in law. The first application of mediation to environmental issues can be found in the early 1970s. By the early 1980s, perhaps 200 environmental issues had been mediated.[4] In 1982, the Administrative Conference of the United States published a report outlining how mediation should be structured to make it consistent with the Administrative Procedures Act and other federal statutes. By 1991 Congress had enacted the Administrative Dispute Resolution Act (ADRA) and the Negotiated Rulemaking Act, codifying alternative dispute resolution (ADR) in federal decision-making. The ADRA encourages federal agencies to adopt policies on the use of ADR for the full range of agency actions. As noted above, in 1998, Congress passed the Environmental Policy and Conflict Resolution Act, establishing the U.S. Institute for Environmental Conflict Resolution.

No comprehensive inventory exists of environmental conflict resolution cases, but the number today clearly is in the thousands. In some situations, people explore their differences early through dialogue. In other situations, people with very diverse interests negotiate solutions to problems long before a "dispute" occurs. In still other situations, parties to litigation settle public disputes with the

[3] CEQ promulgates the regulations interpreting the procedural provisions of NEPA at 40 C.F.R. §§1500-1508.
[4] Bingham, Gail, *Resolving Environmental Disputes: A Decade of Experience* (Washington DC: The Conservation Foundation) 1986.

assistance of a mediator. Many of these cases, at all stages in development, involve NEPA. The basic principles that guide successful processes of resolution are similar, whether they involve public issues or not.[5] However, there are many additional reasons why NEPA and other environmental disputes are challenging to resolve. They include the large number of interested parties, multiple and interrelated issues, complex and uncertain science, complex institutional issues, multiple forums in which the dispute might be decided (perhaps offering different advantages for the contending parties), asymmetry of influence and resources, and the political limelight in which the issues are addressed.

Much already has been learned about constructive dialogue and negotiation in these circumstances, including the value of early situation assessments, inclusiveness, transparency, clear expectations and roles, relationship building, collaborative inquiry and joint fact-finding, analysis of multiple options suggested by interested parties, respecting diverse sources of information, etc. Much more remains to be learned. The USIECR and others are engaged in analysis of case studies and other research to explore and illustrate how the principles in NEPA and the best practices emerging from the conflict resolution field may contribute to accomplishing the national interests established by Congress in 1969.

[5] Fisher and Ury, *Getting to Yes* (citation….)